87-107

No. 87-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BRENDA PATTERSON,

Petitioner,

vs.

McLEAN CREDIT UNION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Does 42 U.S.C. § 1981 encompass a claim of racial discrimination in the terms and conditions of employment, including a claim that petitioner was harassed because of her race?

2. Did the district court err in instructing the jury that in order for petitioner to prevail on her claim of discrimination in promotion that she must prove that she was more qualified than the white who received the promotion?

PARTIES IN THE COURT BELOW

All parties in this matter are set forth in the caption.

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The petitioner, Brenda Patterson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on November 25, 1986.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals is reported at 805 F.2d 1143 and is set

out in the appendix to this petition at pages 1a-20a. The order of the court of appeals denying rehearing is set out in the appendix hereto at pages 21a-22a. The oral ruling of the district court granting in part respondent's motion to dismiss is unreported and is set out in the appendix at pages 23a-25a. The judgment of the district court dismissing the case based on the jury's verdict is set out in the appendix at pages 26a-28a.

JURISDICTION

The judgment of the court of appeals affirming the Court's dismissal of the case was entered on November 25, 1986. App. 1a. The court of appeals entered an order denying a timely petition for rehearing en banc on March 19, 1987. App. 22a. On June 5, 1987, Chief Justice Rehnquist entered an order extending the time for filing a petition for writ of certiorari to and including July 17,

1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves 42 U.S.C. § 1981, which provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(R. S. § 1977.)

STATEMENT OF THE CASE

1. Proceedings Below

The petitioner, Brenda Patterson, brought this action on January 25, 1984, in the United States District Court for the Middle District of North Carolina against her former employer, McLean Credit Union. The action was brought

under 42 U.S.C. § 1981 and alleged that petitioner was discriminated against with respect to promotions, layoffs, and in the terms and conditions of employment, including racial harassment. In addition, the state tort claim of intentional infliction of mental and emotional distress was brought pursuant to pendent jurisdiction.

The case was tried before a jury from November 12 to November 18, 1985. The trial court dismissed the claim of racial harassment on the ground that 42 U.S.C. § 1981 did not provide a remedy for racial harassment during the term of employment.[1] App. 23a-25a. With regard to petitioner's claim that she was discriminatorily denied promotional opportunities, the district court

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[1]The district court also did not submit the state tort claim to the jury. The correctness of that ruling is not raised in this petition.

instructed the jury, over the objection of the petitioner, that she had to prove that she was more qualified for the position than the person who received the job.[2] The jury returned a verdict in favor of the defendant employer and the district court dismissed the case in its entirety. App. 26a-28a.

Petitioner appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed the district court. The court of appeals held that Section 1981 covered only racial

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[2]Transcript of Trial, Nov. 18, 1985:

> THE COURT: . . . the law in the Fourth Circuit seems to be that in order to make out a prima facie case, you must show that you are better qualified than the person who received [the promotion], and I have so instructed the jury.
>
> MR. KENNEDY: I would like, for the purposes of the record, to make an exception to that point.
>
> THE COURT: Yes, sir.

Id. at 5-30 - 5-31.

discrimination in hiring, firing and promotion since those matters went to the "very existence and nature of the employment contract." App. 8a. The court ruled that racial harassment related to the terms and conditions of employment and, therefore, did not, standing alone, abridge the right to make and enforce contracts that was conferred by Section 1981. App. 9a.

With regard to the charge to the jury, the court relied on prior Fourth Circuit precedents requiring that a plaintiff must prove that she was more qualified than the person to whom the promotion was given in order for her to establish a prima facie case of discrimination. Therefore, the instruction was correct. App. 19a-20a.

A timely petition for rehearing and suggestion for rehearing en banc was denied. App. 21a-22a.

2. Statement of Facts

At trial, petitioner introduced substantial evidence to support her claim that she had been a victim of racial harassment and had been treated differently from similarly situated whites in the terms and conditions of employment. At the very beginning of her employment she was told by the defendant's president, Robert Stevenson, that she would be working only with white women and that those women would probably not like her because they were not used to working with blacks. Plaintiff was never promoted; instead, after her immediate supervisor spoke to the president about petitioner's having too heavy a work load, she was given more work by Stevenson.[3] Throughout her employment she was given more work than her white co-workers, and was then

[3]Tr. of Trial, pp. 1-86 - 1-87.

criticised for her alleged "slowness". When she spoke to the president about her work, she testified that he replied, "Well, blacks are known to work slower than whites by nature." He then added on even more work.[4] At staff meetings Mr. Stevenson singled out plaintiff and the other black worker by name and criticised them for errors; white workers were not subjected to this treatment.[5] Finally, Mr. Stevenson would stop by her desk and stare at her four or five times a week, making her nervous and unable to concentrate on her work. Again, white workers were not subjected to this

[4]Id. at 1-88 A white former employee of defendant testified that Mr. Stevenson had berated him for recommending a black man for a computer position. Mr. Stevenson told him that he would not hire a Black because: "We don't need any more problems around here." Transcript of Trial, at p. 2-162.

[5]Id. at 1-89 - 1-90.

treatment.[6]

Plaintiff never was able to find out about promotions that were available.[7] White workers were trained for higher level positions, while she was not.[8] A number of white employees were promoted over her who had less education and seniority, but who were given training.[9] On July 19, 1982, plaintiff was laid off and subsequently terminated; white employees with less experience than her were not.

After the presentation of plaintiff's evidence, the court dismissed the claims of racial harassment and intentional infliction of mental and emotional distress. At the end of the submission of all the evidence the trial

[6]Id. at 1-90 - 1-91.

[7]Id. at 1-91 - 1-92.

[8]Id. at 1-93.

[9]Id. at 1-93 - 1-97.

court instructed the jury that for plaintiff to prevail on the promotion claim she had to prove that she was more qualified for the position of accountant intermediate than was the white person who was promoted.[10] Plaintiff objected

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[10]The district court charged, in addition to instructing that plaintiff had to have shown an interest in being promoted and that a white person, Susan Howard Williamson, was promoted instead, that:

> In order to carry her burden [that defendant denied her a promotion because of her race], the plaintiff must establish . . . (3) that plaintiff <u>was better qualified</u> for the position received by Susan Howard Williamson than was Susan Howard Williamson; and (4) that plaintiff was denied the promotion because of her race. (emphasis added).
>
> With regard to the fourth requirement, plaintiff offered evidence tending to show that she had not been trained for the job of accountant intermediate because of her race and was thus denied the promotion because of her race.

Transcript of Trial, p. 5-12 -5-13.

The court later instructed that:

> [I]t is necessary that [plaintiff]

to this part of the charge.[11] The jury returned a verdict for the defendant company.

REASONS FOR GRANTING THE WRIT

This case presents an important issue relating to the enforcement of the civil rights statutes concerning which the circuits are in conflict. The availability of 42 U.S.C. § 1981 as a remedy for harassment that is motivated by racial animus is particularly important because it is only under that section that damages for such harassment may be obtained. Title VII provides

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> satisfy you by a preponderance of the evidence that she was <u>more qualified</u> to receive the promotion to the accountant intermediate position than was Susan Howard Williamson <u>and</u> that McLean's intentional discrimination against her because of her race was the real reason that she did not receive the promotion.

<u>Id.</u> at 5-13 - 5-14.

[11]<u>See</u> n. 2, <u>supra</u>.

monetary relief only in the form of back pay when, e.g., a promotion has been denied. Thus, in many cases of harassment the only relief available under Title VII will be an injunction that simply reiterates the command of the statute. Often, that relief will not be a sufficient deterrent to harassment.

As the discussion that follows demonstrates, the problem of racial harassment and other discrimination in the terms and conditions of employment is persistent and recurring. Only the threat of actual and punitive damages under 42 U.S.C. § 1981 can provide an effective deterrent and help to rid the work place of this most pernicious form of discrimination.[12]

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[12] See, e.g., Block v. R. H. Macy & Co., Inc., 712 F.2d 1241, 1243, 1245-48 (8th Cir. 1983) (Title VII and § 1981 claims for discharge and racial harassment; $20,000 in actual and $60,000 in punitive damages awarded of which only $7,598 was back pay under Title VII).

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE CIRCUITS AS TO WHETHER 42 U.S.C. § 1981 ENCOMPASSES CLAIMS OF RACIAL HARASSMENT.

The court of appeals here held that Section 1981 does not encompass racial harassment on the reasoning that the statute does not cover discrimination in compensation, terms, conditions, or privileges of employment. Rather it held that § 1981 covers only matters that go to the very existence and nature of the employment contract, such as hiring, firing and promotion. Four other courts of appeals have ruled to the contrary and have held that discrimination in the terms and conditions of employment, including racial harassment, violates Section 1981.

The Fifth Circuit has ruled that an offensive work environment caused by racial harassment "would . . . establish a successful case under 42 U.S.C. §§ 1981

and 1983." Hamilton v. Rodgers, 791 F.2d 439, 442 (1986). Similarly, the District of Columbia Circuit has concluded that Section 1981 encompasses a claim that a black plaintiff suffered "conduct and conditions that were worse than those imposed upon white employees." Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225, 1233 (D.C. Cir. 1984). The court explicitly held that a pattern of differences in the condition of employment, including the telling of a racially derogatory joke, can give rise to liability under Section 1981. Ibid. Therefore, it upheld compensatory damages for humiliation and other emotional harm resulting from "the atmosphere of harassment." Id. at 1236, 1238-39.

Both the Seventh and Eighth Circuits have also permitted recovery under Section 1981 for emotional distress caused by racial harassment in employment

where a defendant subjected a black employee to different terms and conditions of employment because of race. These cases involved discriminatory job assignments, discipline, and other forms of racial harassment. Ramsey v. American Air Filter Company, 772 F.2d 1303 (7th Cir. 1985); Block v. R. H. Macy & Co., 712 F.2d 1241 (8th Cir. 1983).[13] See also Wilmington v. J. I. Case Company, 793 F.2d 909 (8th Cir. 1986).[14] And see,

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[13]Although Block involved claims under both Title VII and § 1981, racial harassment was treated as an independent cause of action under § 1981. The court upheld the jury's damage award for "mental anguish, humiliation, embarrassment and stress," caused by such harassment. 712 F.2d at 1245. Damages for emotional distress are not recoverable under Title VII.

[14]The court in Wilmington specifically upheld an award of damages for "emotional distress resulting from the conditions under which [plaintiff] worked." 793 F.2d at 922. Although the Court did not use the label "racial harassment," the type of discrimination at issue was the same as that involved in the instant case. The plaintiff in Wilmington was assigned to undesirable

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Goodman v. Lukens Steel Co., 777 F.2d 113 (3rd Cir. 1985), aff'd ___U.S. ___, 55 U.S.L. Week 4881 (1987) (affirming finding of liability under § 1981 and Title VII based in part on harassment of black employees).

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jobs so that he would not earn incentive pay, 793 F.2d at 915; plaintiff in the instant case was given the undesirable job of sweeping and dusting not required of white clerical workers and was assigned an exorbitant amount of work in an attempt to force her to resign. Plaintiff in Wilmington was repeatedly verbally reprimanded, id.; plaintiff in this case was criticized in staff meetings and subjected to racially derogatory remarks. The defendant in Wilmington moved the plaintiff's work station closer to the foreman's office to keep a close watch on him, id.; in this case, defendant's president stared at plaintiff for several minutes several times a week.

II.

THE DECISION BELOW IS INCONSISTENT WITH DECISIONS OF THIS COURT, INCLUDING GOODMAN V. LUKENS STEEL CO. AND SHAARE TEFILA CONGREGATION V. COBB

Since the decision of the court below this Court has indicated that liability under both §§ 1981 and 1982, parallel provisions of the Civil Rights Act of 1866, can be based on harassment based on race. In Goodman v. Lukens Steel Co., ____ U.S. ___, 55 U.S.L.Week 4881 (1987) the Court affirmed findings that § 1981 had been violated by, inter alia, toleration by both an employer and a union of racial harassment of black employees. 55 U.S.L. Week at 4883. In Shaare Tefila Congregation v. Cobb, 481 U.S. ___, 95 L.Ed.2d 594 (1987), the Court reversed the Fourth Circuit and held that claims by Jews that they had been subject to harassment and vandalism because of their ancestry stated a cause

of action under § 1982. Plaintiff urges that these decisions directly support their contention that discrimination in the terms and conditions of employment is prohibited by § 1981.

The conclusion that § 1981 prohibits racial harassment in employment is consistent with the language and purpose of the statute. Section 1981 guarantees to blacks "the same right . . . to make and enforce contracts . . as is enjoyed by white citizens," (emphasis added). A contract is a combination of many "terms and conditions." For example, a contract to sell goods generally specifies the nature and quantity of the goods, the price, the method of payment, the method of delivery and possibly other "terms and conditions." A contract for employment either explicitly or implicitly covers at least the nature of the job, the salary, the working hours, work rules, and

penalties for violations thereof, and the location of the job. As this Court noted in Hishon v. King & Spaulding, 467 U.S. 69, 74 (1984):

> Because the underlying employment relationship is contractual, it follows that the "terms, conditions, or privileges of employment" clearly include benefits that are part of an employment contract.

Despite these considerations, the court below concluded that the only element of the right to contract protected by § 1981 is the right to obtain employment under an unequal set of conditions. Under the reasoning of the court below, an employer that offered to employ black individuals at a lower salary than white individuals would not violate § 1981, since black individuals would not be totally deprived of the right to contract for a job. This analysis ignores § 1981's protection of an equal right to contract.

The lower court's opinion does not

distinguish, and there is no basis for a distinction, between explicit and implicit conditions of a contract. Under the court's decision, an employer could say to black applicants: "I will hire you if you agree that I may constantly abuse you, give you the worse job assignments and subject you to racially derogatory remarks." Such a condition, were it known at the outset of the contractual relationship, would surely discourage black individuals from entering into an employment contract and thus deprive them of an equal right to make such contracts. The fact that these terms and conditions of employment are not stated at the outset and are not put into a written document does not lead to a different result. The employer's actions establish that these are implicit conditions of the contract which are different for black employees than for

white employees, thus depriving black employees of an equal right to make an acceptable employment contract.

Section 1981's prohibition of discrimination in all of the terms and conditions of the employment contract was made clear by this Court in Johnson v. Railway Express Agency, 421 U.S. 454 (1975). The Court in Johnson found that one of the purposes of § 1981 is to "affor[d] a federal remedy against discrimination in private employment on the basis of race." Id. at 459-60. The Court did not distinguish between hiring, firing and promotion and other terms and conditions of the employment relationship. In fact, the plaintiff's claim in Johnson v. Railway Express Agency, was not about hiring, firing or promotion, but rather discrimination in other terms and conditions of his employment -- seniority rules and job

assignments. Id. at 455.

The legislative history of § 1981 also supports coverage of terms and conditions of the employment contract, including work environment and racial harassment. Section 1981 was first enacted as part of § 1 of the Civil Rights Act of 1866. The legislative history and purpose of § 1 was analyzed in detail by this Court in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).[15] The Court in Jones v. Mayer repeatedly emphasized that the 1866 Act was "cast in sweeping terms" in order "to prohibit all racially motivated deprivations of the rights enumerated in

[15]The provision of the 1866 Act at issue in Jones v. Alfred H. Mayer Co. has been codified as 42 U.S.C. § 1982. In language parallel to that of § 1981, § 1982 guarantees "the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." See 392 U.S. at 441, n. 78.

the statute." Id. at 422, 426.[16] This Court relied on legislative history that Congress "believed that it was approving a comprehensive statute forbidding all racial discrimination affecting the basic civil rights enumerated in the Act." Id. at 435 (emphasis added). See also id. at 436.

In addressing the meaning of § 1982, the parallel provision to § 1981 that guarantees equal rights to sell and lease property, the Court held that the 1866 Act conferred "'the right . . . to purchase . . . real estate . . . without any qualification and without any restriction whatever . . . .'" Id. at 435 (emphasis added) (quoting Cong. Globe, 39th Cong., 1st Sess. at 1781 (Senator Cowan)). Thus, the Court ruled that § 1982 prohibited all racial

[16]See also 392 U.S. at 431 ("sweeping and efficient"); id. at 433 ("sweeping . . . effect").

discrimination in the sale and rental of property. Id. at 436-437.

The Court also stressed that the 1866 Act was intended to give "real content" and "practical" meaning to the guarantees of the Thirteenth Amendment. Id. at 427, 431 (quoting Cong. Globe, 39th Cong., 1st Sess. 474 (Senator Trumbull))[17] Thus, the Act was intended to eliminate the "'private outrage and atrocity'" that were "'daily inflicted on freedmen.'" Id. at 427.

The panel decision's restrictive construction of § 1981 is inconsistent with this legislative history. Congress' desire to prohibit "all racial discrimination affecting" the ability to make and enforce contracts clearly encompasses racial harassment which interferes with enjoyment of the benefits of the contract. Congress' desire to

[17] See also 392 U.S. at 434.

provide "practical" freedom of contract and to prevent oppression of black citizens would be rendered meaningless if an employer could, through harassment, deprive black employees of a work experience equal to that of white employees.

In light of these considerations it would be appropriate to vacate the decision of the Fourth Circuit and to remand for further consideration in light of this Court's recent decisions in Goodman v. Lukens Steel Co. and Shaare Tefila Congregation v. Cobb.

III.

THE DECISION BELOW RELATING TO BURDEN OF PROOF CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

A. The Decision Below Conflicts With Texas Dept. of Corrections v. Burdine.

As described above, the district court, over plaintiff's objection, instructed the jury that in order for the

plaintiff to prevail on her discrimination in promotion claim she must prove that she was better qualified for the position than was the white employee who received it. Indeed, the district court further instructed the jury that plaintiff must prove both that she was more qualified and that the employer's intentional discrimination against her because of her race was "the real reason" that she was not promoted.

These instructions, and the line of cases in the Fourth Circuit upon which they were based,[18] are in conflict with the holdings of this Court and with other circuits. The Fourth Circuit's rule squarely conflicts with this Court's decision in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 259

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[18] Young v. Lehman 748 F.2d 194 (4th Cir. 1984); Anderson v. City of Bessemer City, 717 F.2d 149 (4th Cir. 1983), rev'd on other grounds, 470 U.S. 564 (1985).

(1981). There, it was held that an "employer has discretion to chose among equally qualified candidates "provided that the decision is not based upon unlawful criteria." (Emphasis added.) Admittedly, the mere fact that an employer has chosen a white when there were two equally qualified candidates does not by itself establish discrimination. However, Burdine makes it clear that discrimination can be established absent proof that the Black was better qualified.

To give an example, assume that the selecting official testified that the white and black candidates were equally qualified and therefore he picked the white person because he thought a white would fit in better with an all-white work force. Such testimony would establish beyond question a violation of § 1981. Nevertheless, under the district

court's instruction, the jury here would have been required to find for the employer.

The import of the instruction is to focus the jurors' inquiry entirely on the question of relative qualifications to the exclusion of other evidence from which a finding of discrimination could be inferred. Petitioner introduced substantial evidence that she had been subjected to racially derogatory remarks, had been discriminatorily denied training, and had been harassed because of her race. This evidence would amply support an inference that petitioner had been discriminated against and was denied the promotion irrespective of her qualifications or those of her white co-worker. However, once the jurors had decided that petitioner had not demonstrated superior qualifications, the court's instructions would necessarily

lead them to ignore the other evidence that petitioner had been subjected to disparate treatment.

B. <u>The Decision Below Is In Conflict With Decisions Of Other Circuits.</u>

In explaining the instruction given to the jury the district court stated: "The law in the Fourth Circuit seems to be that in order to make out a prima facie case you must show that you are better qualified than the person who received the promotion."[19] The court of appeals upheld this instruction on the ground that where the reason given in rebuttal to justify an action by the employer was the relative qualifications of the blacks and white applicants, then the plaintiff has the burden of proving that her qualifications are superior.

Both holdings are in conflict with decisions of other circuits. <u>First,</u>

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[19]<u>See</u> n. 2, <u>supra</u>.

there is substantial agreement among the other courts of appeals that a plaintiff need only establish that she was qualified for the position in order to make out a prima facie case, and not that she had superior qualifications. In Mitchell v. Baldrige, 759 F.2d 80 (D.C. Cir. 1985), the court vacated the dismissal of the plaintiff's case when a district court required that the plaintiff demonstrate that she was at least as qualified as the person chosen. The Seventh, Eighth, and Ninth Circuits have similarly held that an employee need only show that he or she was qualified for the position at issue in order to establish a prima facie case. See, Christensen v. Equitable Life Assurance Soc., 767 F.2d 340, 342-343 (7th Cir. 1985); Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810 (8th Cir. 1983); Foster v. Arcata Associates, Inc., 772 F.2d 1453,

1460 (9th Cir. 1985). See also Grano v. Department of Development of the City of Columbus, 637 F.2d 1073, 1079 (6th Cir. 1980).

Second, although in the present case the trial went beyond the stage of proving a prima facie case (see, United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983)), the approval by the Fourth Circuit of the instruction is in conflict with the law of two other circuits. Thus, in Hawkins v. Anheuser-Busch, Inc., 697 F.2d at 813-15, the Eighth Circuit held that although the defendant had rebutted the prima facie case by articulating the selectees' superior qualifications, the explanation was shown to be a pretext because the plaintiff proved that she was at least as qualified for the position. Thus, under Hawkins, in the appropriate circumstances a showing of equal qualifications would

be sufficient to prove the Title VII claim because it would demonstrate the pretextual nature of the proffered explanation.

Similarly, in Joshi v. Florida State University Health Center, 763 F.2d 1227, 1235 (11th Cir. 1985), the Eleventh Circuit held that the relative qualifications of the persons hired could not be the reason for the defendant's failure to hire the plaintiff since she was not actively considered for the position. Here also there was ample evidence from which a properly instructed jury could have found that plaintiff had never been seriously considered for the promotion and had been prevented from being so because of a discriminatory denial of training. Such a conclusion was foreclosed by the district court's instruction that the plaintiff could not win unless she proved that she was more

qualified than the selectee.

In summary, the district court's instruction that proof of superior qualifications was an absolute requirement for the plaintiff's case conflicts with the law in five other circuits. The issue of the question of relative qualifications is a recurring one in the lower courts. See United States Postal Service v. Aikens, 460 U.S. at 713. Given both the conflict in circuits and the recurrence and importance of the issue, certiorari should be granted to resolve it in the present case.

CONCLUSION

For the foregoing reasons certiorari should be granted and the decision of the court below reversed.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 85-2394

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Brenda Patterson,

Appellant,

versus

McLean Credit Union,

Appellee.

==========

Appeal from the United States District Court for the Middle District of North Carolina, at Winston-Salem. Hiram H. Ward, Chief District Judge. (84-0073)

Argued October 9, 1986. Decided November 25, 1986

Before WIDENER and PHILLIPS, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

Harold L. Kennedy, III; Harvey L. Kennedy (Kennedy, Kennedy, Kennedy and Kennedy on brief) for Appellant; H. Lee Davis, Jr. (George E. Doughton, Jr.; Hutchins Tyndall, Doughton and Moore on brief for Appellee.

PHILLIPS, Circuit Judge:

In this action the plaintiff, Brenda Patterson, sued her employer, McLean Credit Union (McLean), on claims, under 42 U.S.C. § 1981, of racial harassment, and failure to promote and discharge, together with a pendent state claim for intentional infliction of mental and emotional distress.* The district court submitted the § 1981 discharge and promotion claims to the jury which returned a verdict in favor of McLean, and granted

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* Presumably for statute of limitations reasons, Patterson did not assert a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), et seq.

directed verdicts to McLean on the § 1981 racial harassment claim and on the pendent state claim for intentional infliction of mental and emotional distress. We hold that the claim for racial harassment was not cognizable under 1981; that the evidence was insufficient to support the pendent state claim; and that the court did not err in its jury instructions nor in its evidentiary rulings on the submitted claims under 1981. We therefore affirm.

I.

Brenda Patterson, a black woman, was an employee of McLean Credit Union from May 5, 1972 to July 19, 1982, when she was laid off. Robert Stevenson, McLean's president, hired Patterson to be a teller and file coordinator. According to Patterson's testimony, when he hired her,

Stevenson told Patterson that the other women in the office, who were white, probably would not like her because she was black. During her ten years of employment with McLean, Patterson experienced treatment that she considered to be racially motivated harassment by Stevenson. She testified that he periodically stared at her for several minutes at a time; that he gave her too many tasks, causing her to complain that she was under too much pressure; that among the tasks given her were sweeping and dusting, jobs not given to white employees. On one occasion, she testified, Stevenson told Patterson that blacks are known to work slower than whites. According to Patterson, Stevenson also criticized her in staff meetings while not similarly criticizing

white employees.

Patterson never was promoted from her position as teller and file coordinator throughout her tenure at McLean. Susan Williamson, a white employee who was hired by McLean in 1974 as an accounting clerk, received a title change from "Account Junior" to "Account Intermediate" in 1982. This title change entailed no change of responsibility. Patterson asserted that Williamson's title change was a promotion that Patterson herself should have received, based primarily on her seniority over Williamson. Patterson also claimed that her 1982 layoff was discriminatory because white employees with less experience kept their jobs.

Patterson based her § 1981 claims and her state claim of intentional

infliction of mental and emotional distress on the evidence above summarized. The district court held that a claim for racial harassment is not cognizable under § 1981, and refused to submit that claim to the jury. Examining North Carolina case law applicable to Patterson's pendent state claim, the district court concluded that Stevenson's treatment of Patterson did not rise to the level of outrageousness required under state law for recovery for intentional infliction of emotional distress and directed a verdict against Patterson on that claim. The court submitted the 1981 claims for discriminatory failure to promote and discharge to the jury, which returned a verdict for McLean. This appeal followed.

II.

Patterson first challenges the court's refusal to submit her related claims for racial harassment and intentional infliction of mental and emotional distress to the jury.

A.

We hold, in agreement with the district court, that Patterson's claim for racial harassment is not cognizable under § 1981, which provides in relevant part that "[a]ll persons within the jurisdiction of the United States shall have the same right ... to make and enforce contracts ... as is enjoyed by white citizens." That racial harassment claims are cognizable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), does not persuade us otherwise. The broader language of Title VII, which

makes unlawful "discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race," 42 U.S.C. § 2000 (e)(2)(a) (emphasis added), stands in critical contrast to § 1981's more narrow prohibition of discrimination in the making and enforcing of contracts. Cf. United States v. Buffalo, 457 F. Supp. 612, 631 (W.D.N.Y. 1978)(the intentionally broad provisions of Title VII accommodate claims based on having to work in a racially discriminatory environment), modified on other grounds, 633 F.2d 643 (2d Cir. 1980). Claims of racially discriminatory hiring, firing, and promotion go to the very existence and nature of the employment contract and thus fall easily within § 1981's protec-

tion. Instances of racial harassment, on the other hand, may implicate the terms and conditions of employment under Title VII, see e.g., EEOC v. Murphy Motor Freight, 488 F. Supp. 381, 384-86 (D. Minn. 1980), and of course may be probative of the discriminatory intent required to be shown in a § 1981 action, see e.g., Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225, 1233 (D.C. Cir. 1984), but, standing alone, racial harassment does not abridge the "right to make" and "enforce" contracts - including personal service contracts - conferred by § 1981.

The cases relied on by Patterson are not to the contrary. None directly holds that racial harassment gives rise to a discrete claim under § 1981, as distinguished from recognizing that racial harassment may be relevant as evidence of

discriminatory intent supporting a cognizable claim of employment discrimination under § 1981 and that it may give rise to a discrete Title VII claim. See Murphy Motor Freight, 488 F. Supp. at 384 (Title VII claim for racial harassment); Buffalo, 457 F. Supp. at 632-35, 636-37 (discriminatory work environment claim under Title VII; 1981 claims of discriminatory assignment and termination). But cf. Goodman v Lukens Steel Co., 580 F. Supp. 1114, 1164 (E.D. Pa. 1984)(very generally citing § 1981, along with Title VII, as a basis for a claim of racial harassment) Croker v. Boeing Co., 437 F. Supp. 1138, 1191-92, 1193-94, 1195, 1198 (E.D. Pa. 1977)(discussing racial harassment claim only under Title VII, but indicating liability based upon both Title VII and § 1981 in order),

modified on other grounds, 662 F.2d 975 (3d Cir. 1981).

We therefore affirm the district court's grant of directed verdict in Patterson's claim of racial harassment under § 1981.

B.

We also agree with the district court that Patterson's evidence was not sufficient to support submission of her pendent state claim of intentional infliction of mental and emotional distress. The essential elements of such a claim under North Carolina law are (1) extreme, outrageous conduct, (2) intended to cause and causing (3) severe emotional distress. E.g., Dickens v. Puryear, 276 S.Ed.2d 325, 335 (N.C. 1981). The district court ruled that given its most favorable reading, Patterson's evidence

of McLean's conduct did not rise to the level of outrageousness and extremity required by the North Carolina courts to allow recovery under this cause of action. We agree with this assessment. The standard of "outrageousness" established in the relatively few state court decisions is understandably a stringent one. Recovery under that standard has been permitted only for conduct far more egregious than any charged to McLean in Patterson's evidence.

For example, in Woodruff v. Miller, 307 S.Ed.2d 187, 178 (N.C. App. 1983), recovery was permitted where a defendant had employed what the court characterized as "truculent, vindictive methods" inspired by a "consuming animus against plaintiff" to circulate a thirty year old record of plaintiff's" nolo contendere

plea to a criminal charge, had compared plaintiff to dangerous fugitives, and had taken open delight in plaintiff's resulting mental disturbance.

In Dickens, recovery was permitted against a defendant who had assaulted plaintiff and threatened to kill him unless he left the state.

Of particular relevance is Hogan v. Forsyth Country Club Co., 340 S.E.2d 116 (N.C. App. 1986), in which one of three female plaintiffs recovered for intentional infliction of emotional distress when a fellow employee of her employer-defendant screamed and shouted at her, engaged in non-consensual and intimate sexual touching, made sexual remarks, and threatened her with a knife. Significantly, the two other plaintiffs were denied recovery though the same fellow

employee had screamed, shouted, and thrown a menu at one of them and had given strenuous work to and denied the request of another, who was pregnant, to leave work when she thought she was in labor.

Evaluated in light of the stringent standard established by these decisions, the conduct of McLean through its president, Stevenson, was not "extreme and outrageous." That Stevenson stared at Patterson often, gave her too much work, required her to sweep and dust, and commented that blacks are slower than whites are facts that, though patently unworthy if true, fall far short of those in any North Carolina decision finding "extreme and outrageous" conduct under this state tort cause of action.

We therefore affirm the district courts grant of directed verdict on this claim.

III.

Patterson next challenges the exclusion of proffered testimony by two witnesses in support of her submitted claims of employment discrimination under § 1981 and a jury instruction respecting claimant's burden of proof on her promotion claim.

Marie Roseboro was tendered as an expert in personnel administration and would have given an opinion that Patterson was better qualified than Susan Williamson for the "promotion" given the latter. The district court refused to admit this proffered testimony on the basis that it did not meet the requirement of Fed. R. Evid. 702 that expert

testimony be helpful to the trier of fact.

The court also excluded the lay testimony of another black women formerly employed by McLean, Anita Reid Stovall, to the effect that she had experienced harassment by Stevenson during her employment in 1972. The court ruled this testimony inadmissible under Fed. R. Evid. 403, finding its probative value on the issue of discriminatory intent outweighed by its remoteness in time and its potential to confuse and mislead the jury.

There was no abuse of discretion in the trial court's decision to exclude the testimony of these two tendered witnesses. Because of the remoteness in time of the events to which Stovall would have testified, the probative value of

that evidence would have been slight and the court could properly conclude that its slight value was outweighed by the likelihood of confusion it might create on the issue on which it was tendered. See Fed. R. Evid. 403.

The district court also could properly conclude that Roseboro's proffered testimony regarding the relative qualifications of Patterson and other McLean employees would not be helpful to the jury so as to justify its admission as expert opinion under Fed. R. Evid. 702. The trial court's conclusion that the jury needed no aid in making a finding on the relative qualifications of clerical employees at a credit union, a comparison that is not a highly technical or complicated one, was not an abuse of its discretion.

IV

Finally, Patterson complains that the trial court erroneously instructed the jury that in order for her to prevail on her promotion discrimination claim, she had to show that she was more qualified than Susan Williamson. There was no error in the instruction given.

An employee claiming race discrimination in employment decision sunder § 1981 must prove intentional discrimination. Such a claim is therefore comparable to the individual disparate treatment claim under Title VII. The disparate treatment proof scheme developed for Title VII actions in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and its progeny, may properly be transposed, as here, to the jury trial of a § 1981 claim. See Carter, 727 F.2d at 1232.

Under that scheme, once an employer had advanced superior qualification as a legitimate nondiscriminatory reason for favoring another employee over the claimant, the burden of persuasion is upon the claimant to satisfy the trier of fact that the employer's proffered reason is pretextual, that race discrimination is the real reason.

That was the situation here, and the district court therefore properly instructed the jury that the burden was upon the claimant to prove her superior qualifications by way of proving race discrimination as the effective cause of the denial to her of "promotion." See Young v. Lehman, 748 F.2d 194, 197-98 (4th Cir. 1984); see also Loeb v. Textron, Inc., 600 F.2d 1003, 1010, 1016 (1st Cir. 1979)(effect on jury instructions of

transposing McDonnell Douglas proof scheme to jury trial of ADEA claim). This simply reflects the principle established in Title VII cases that an employer may, without illegally discriminating, choose among equally qualified employees notwithstanding some may be members of a protected minority. See Anderson v. City of Bessemer City, 717 F.2d 149, 154 (4th Cir. 1983), rev'd on other grounds, 470 U.S. 564 (1985).

The court's instructions here were therefore proper.

AFFIRMED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 85-2394

BRENDA PATTERSON,

Plaintiff-Appellant,

versus

MCLEAN CREDIT UNION,

Defendant-Appellee.

O R D E R

There having been no request for a poll of the court on the petition for rehearing en banc, it is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel has considered the

petition for rehearing and the response thereto and is of opinion the petition is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Judge Phillips and Judge Haynsworth.

/s/ H. E. Widener, Jr.

For the Court

Filed: March 19, 1987.

ORAL RULING OF DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

BRENDA PATTERSON, Plaintiff	CIVIL ACTION NO. C-84-73-WS
vs.	
McLEAN CREDIT UNION, Defendant	

TRANSCRIPT OF TRIAL

BEFORE THE HONORABLE HIRAM H. WARD, and a jury

Vol. 3 of 5

• • •

MR. KENNEDY: Your Honor, I'd like to address, if I could, that one claim that -- it was assumed in the other two claims -- but really, under the law, racial harassment or failure to have a working environment free of racial prejudice is a separate thing.

THE COURT: Yes, I understand that, and this is a 1981 case -- and if the jury finds a history of racial harassment which culminated in failure to promote and discharge of the plaintiff, they can take that into consideration. But it is not a separate claim under Title -- under Section 1981, in my opinion, in the context of this case.

MR. KENNEDY: We cited some cases similar to the case at bar here in our brief --

THE COURT: Yes, sir, they are all Title VII cases, aren't they?

MR. KENNEDY: But, Your Honor, that, to me, when I look at --

THE COURT: Well, it isn't to me, and I've already ruled on it, so that's the way its going to go. I'm going to let the promotional claim go to the jury,

and I'm going to let the layoff and subsequent termination claim go to the jury, and I'm dismissing the rest of the claims.

(Pages 3-75-3-76.)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

BRENDA PATTERSON,	:	
	:	
Plaintiff	:	
	:	
v.	:	C-84-73-WS
	:	
MCLEAN CREDIT UNION,	:	
	:	
Defendant	:	

J U D G M E N T

This case came on for trial before the Court and a jury on November 12-18, 1985, and the issues having been duly tried and answered by the jury as follows:

1. Did defendant unlawfully discriminate against plaintiff because of her race, in violation of 42 U.S.C. § 1981:

a. by denying plaintiff a promotion received by Susan Howard Williamson?

Answer: No
(Yes or No)

b. by laying off plaintiff on July 19, 1982 and subsequently discharging plaintiff?

Answer: No
(Yes or No)

2. If defendant did unlawfully discriminate against plaintiff, what amount of compensatory damages, if any, is plaintiff entitled to recover:

a. for defendant's denying plaintiff a promotion received by Susan Howard Williamson?

Answer: _____
(Amount)

b. for defendant's laying off

plaintiff on July 19, 1982 and subsequently discharging plaintiff?

Answer: _____
(Amount)

3. If plaintiff was discriminated against in her employment because of her race, and the defendant's actions in so doing were malicious, wanton, or oppressive, what amount of punitive damages, if any, is plaintiff entitled to recover from defendant?

Answer: _____
(Amount)

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover nothing on her claims against the defendant and that this action be, and the same hereby is, DISMISSED.

S/
United States District Judge

November 20, 1985.